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COUNTING THE ELECTORAL VOTE.

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Hon. W. W. Macfarland, New York.

DEAR SIR: I have reconsidered your request to put upon paper my views respecting the dangerous complications arising out of the late presidential election, and have concluded to comply with it. The subject, it must be conceded, concerns the most vital of the principles upon which our institutions rest, and lies at the very foundation of the peace and security of the people. With the most perfect propriety did Mr. Jefferson, in his first inaugural address, class among the "essential principles" of the Government "a jealous care of the right of election by the people, a mild and safe corrective of abuses which are lopped by the sword of revolution where peaceable remedies are unprovided;" and "absolute acquiescence in the decisions of the majority, the vital principle of republics, from which is no appeal but to force, *the vital principle and immediate parent of despotism;*" and, with a strength and beauty of expression peculiarly his own, combining historic truth and solemn admonition, he adds: "These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation. The wisdom of our sages and blood of our heroes have been devoted to their attainment; they should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust, and, should we wander from them in moments of error or alarm, let us hasten to retrace our steps, and to gain the road which

alone leads to peace, liberty, and safety." No one can disguise from himself the fact that a large number (I think I may say a large majority) of the American people are most seriously apprehensive that these sacred principles are in danger of being overthrown, by giving effect to false and fraudulent returns of the vote of one or more States, upon which the issue of the presidential contest may depend. They honestly think that States have legally voted, by decisive majorities, for the Tilden and Hendricks electors, which have been illegally returned for their competitors, and that the arbitrary use of such returns to determine the election would be a fraud alike upon those States and every other State in the Union. Abating something from the apprehension generally felt that such use will be made of these returns, I share fully in the conviction expressed; but I could not retain my own self-respect, or consider myself worthy of the high privileges of an American citizen, if I did not hold myself open to receive and fairly consider any further facts that may be developed. In saying, therefore, for myself, that all I desire or expect is an honest and truthful decision upon all the facts brought to light, when applied to the election laws of those States, I believe I am expressing the wish, not alone of those who coincide with me in opinion, but of all who are still in doubt, and even the mass of those who have formed a different opinion.

With such a decision, whatever might be the result, universal acquiescence would be secured, and men could again return to their ordinary avocations, with the comforting assurance that our institutions were equal to every emergency, and that truth, justice, and manhood, still ruled in the councils of the country.

But to every suggestion of such a settlement the answer is that no authority has been conferred upon any earthly tribunal to go back of the certificates of the returning board: that, whether they have certified truth or falsehood, it is equally conclusive; and that the President of the Senate alone, of all the Federal authorities, has any further duty to perform; and he only the ministerial duty of opening, in the presence of the two Houses, the certificates of the electors and counting the votes therein contained. These results are said necessarily to

follow from the fact that the members of the returning board are merely State officers, executing the election laws of the State, and that any interference with what they may do would be an encroachment upon the reserved rights of the State; and from the total want of any authority conferred upon any branch or department of the national Government.

These positions are certainly not weakened by the fact that the gentlemen who put them forward have not heretofore been regarded as very solicitous for the rights of the States when they were supposed to conflict with Federal power; and yet, if these members are mere State officers, executing State duties, it is somewhat difficult to see how a Federal court could intervene and withdraw them from the control of the highest court in the State.

But, be this as it may, after a careful examination of the whole subject, and bestowing much reflection upon it, I have arrived at the conclusion that our fathers have made no such cover for a fraudulent despotism, and have imposed no such ruinous imbecility upon the government of a free people. On the contrary, I am perfectly satisfied that the representatives of the States and the people, composing the two branches of the national Congress, have been invested with the most ample authority to protect each State, and all the States, from every attempt at fraud or illegality in the return or counting of the electoral vote; and I cannot regard an abdication of this authority, either from partisanship or timidity, as anything short of a criminal breach of one of the most sacred trusts committed to their keeping.

I shall state briefly my reasons for this conclusion:

1. Upon the precise question here presented it is readily conceded that the language originally employed in the second, and afterward carried into the twelfth article of the Constitution, might have been made much more explicit than it is found to be; and from this arises the necessity of a fair and reasonable construction, which shall preserve the *intention* of those who framed and adopted the instrument.

I need not mention the time-honored principles which guide in such an inquiry. Suffice it to say that, whether we look to the men who employed the language, to the great ob-

jects they were endeavoring to accomplish, to the nature and purpose of this particular provision, to the symmetry and consistency of their work as a whole, or to the very language of this article itself, the idea is equally repelled that it was ever intended to commit this delicate trust to a mere presiding officer of one branch of the national Legislature (who might be, and several times already has been, a candidate for the office himself), rather than to the representatives of the people and the States, whose organized presence at the very time and place is provided for.

It is simply stating what is known to every intelligent man, to say that the members of that convention for ability, patriotism, and political experience, were among the first men of their age; that they were endeavoring to form a government complete, self-acting and self-adjusting in all its parts—founded not upon the physical force afforded by armies and navies, but upon the free suffrage and moral conviction of a great people. To the success of such a plan, internal peace and tranquillity were indispensable conditions, and an efficient mode for the settlement of disputes and controversies an absolute necessity. The debates abundantly show that the periodical selection of a chief Executive was regarded as likely to bring one of the heaviest strains upon the system; and every member must have been deeply impressed with the danger that the violence of parties and the thirst of individuals for the distinctions and emoluments of office might beset such an election, from the first step to the last, with such fraud or violence as to defeat the true will of the people.

It is true that the chief reliance was placed upon the States; but the last act in the process—and by no means the least important—that of collecting the aggregate will of the people of all the States, and ascertaining whether the votes cast on their behalf respectively had been given in conformity with their own laws, by persons competent to give them, and for persons competent to receive them in obedience to the requirements of the Constitution of the United States—must of necessity be the act of the common Government, and the duty could be discharged by no other.

In the light of these considerations neither the language

nor purposes of the constitutional provision seem to be doubtful.

After requiring the certified lists of the electors to be transmitted to the seat of Government, directed to the President of the Senate, this language follows: "The President of the Senate shall, *in the presence of the Senate and House of Representatives*, open all the certificates, *and the votes shall then be counted.*"

The language is completely inappropriate to devolve this last duty upon the President of the Senate. Twice as many words are used to make the sentence obscure as would have been necessary to make it perfectly plain. One plain command is laid upon this officer: he "shall open all the certificates." If it had been intended that he should perform the other duty also, all that was necessary, sensible, or appropriate, was to add the words—"and count the votes."

It is well known to every student of the Constitution that no such redundancies are anywhere to be found. It is remarkable alike for its sententious brevity and the purity of its English. But the votes must then be counted. By whom? But one of two agencies is possible; either the President of the Senate or the Houses must perform the duty. If the former, it is devolved upon a single man, possibly acting in his own case, and in any event placed under great temptations, and subjected to the most injurious suspicions; without means at his command to inform himself whether the certificates are true or false, genuine or fictitious, or in case of more than one from the same State, which should be used—whose decisions when made would be likely to command very little respect, and might reflect lasting discredit upon the candidate who had profited by them. On the other hand, if the right belongs to the Houses, it is devolved upon bodies whose members are drawn from every State, and from every section of the country; to whose control is committed the national Treasury, with the most ample powers to compel the appearance of persons and the production of papers necessary to a full understanding of the disputed questions which may arise, respecting the honesty or legality of the votes returned; and, finally, whose conclusions when announced would generally be re-

ceived as the final judgment of the public; at the same time satisfying the moral sense of the country, and insuring the public tranquillity.

I take no liberties with the language of the sentence in arriving at the conclusion that the change of phraseology which occurs in it evinces a change of purpose; and that when correctly construed it imposes only upon the President of the Senate the appropriate duty of a presiding officer—the obligation of receiving, opening, and laying before the Houses over which he presides, all the certificates purporting to come from the electors; and that the obligations of the Houses then arise to examine and canvass them all, and by a count of the legal votes therein contained to determine upon whom the choice of the American people has fallen.

This is but following the standard rules of interpretation, which require equivocal language to be so used, if possible, as to avoid absurd or inconvenient consequences, and to give some meaning and a sensible application to all the words employed.

2. While this construction preserves intact all the just rights of the States, it makes the Constitution harmonious and consistent in all its parts. Without it no adequate provision has been made for protecting the executive department from illegality, fraud, or even usurpation. That so wise a body of men should have made such a fatal omission, leaving that department to the results of chance, is not to be believed. But the right of the States over the constitution of this department is much too broadly stated, when it is claimed to be larger or more absolute than over the legislative department. Both are alike subject to the paramount provisions of the Constitution; and no State has the right to be represented by whom it may please, either in Congress or the electoral college, but only by such persons as have the qualifications prescribed in the Constitution. Nor have the electors of any State the unrestrained right to vote for whom they may please for President or Vice-President, but only for such persons as have the qualifications required. I grant in the fullest manner the right of the States to prescribe the *manner* of appointing the requisite number of qualified persons for electors,

and their further right to have the legal votes of the *persons thus appointed, in accordance with their laws*, counted in the general canvass. But it would be little less than preposterous to claim that one clause of the Constitution had required votes to be counted which another had declared illegal or positively prohibited, or that the votes of persons not appointed in any State, although presenting themselves with a fictitious, false, or fraudulent certificate, should be counted, in violation alike of the laws of the State and of the Constitution. All such attempts would involve so palpable a fraud upon the common bond of union, and upon the other parties to it, as probably to receive no countenance from any quarter. But when such questions arise, often dependent upon facts outside the face of the papers presented, a competent tribunal to settle them to the satisfaction of the country becomes an indispensable necessity; and in my opinion it has been supplied in the two branches of the national Legislature: that, as each branch has been given the power to judge of the elections, returns, and qualifications of its own members, so both together have been invested with the most ample authority to judge of and honestly count the votes returned for President and Vice-President of the United States, and under the most solemn obligation to see that the Constitution is not violated, or the legally-expressed will of the people perverted.

3. But if all other considerations for vesting this power in Congress should be thought inconclusive, the long practice and numerous precedents of its exercise ought to be deemed utterly conclusive of the proper construction of the constitutional provision. It is impracticable for me to enter into details. Suffice it to say that there never has been a moment of time, from the complete organization of the Government to the present, that the Houses have not claimed and exercised this right; and, during all that long period, no President of the Senate has ever claimed or exercised the right of counting or proclaiming a vote not authorized by the Houses.

From first to last the course of proceeding has been nearly the same. By previous resolution of the Houses a joint meeting has been provided for at the appointed time; the Senate appointing one teller, and the House two, to make a list of the

votes and declare the result to the President of the Senate, who should announce the same and the persons elected to the Houses, which should be deemed a sufficient declaration of the choice made. At the meeting the President of the Senate generally opened the packages and delivered them to the tellers, who read the certificates to the Houses when requested, and delivered a list of the votes to the presiding officer, who made the announcement required by the joint resolution.

For many years, no objection being made to any vote, the proceedings were entirely formal; but during this time they were always conducted as directed by the Houses, and the votes were actually counted by their regular organs—the tellers.

The case of Missouri in the canvass of 1821 is perhaps the first in which the question actually arose, upon objection made to the votes from a State. The Houses did not decide upon the validity of the objection, but they exercised the power quite as emphatically by directing the President of the Senate to announce the vote of that State hypothetically; and if, in any event, the result of the election was the same, to declare the persons elected. The same course was taken in the canvass of 1837 with the votes from the State of Michigan.

The matured opinion of that day as to the province of the Houses is very clearly indicated in the preliminary statement of the able President of the Senate. He said: "The two Houses being now convened *for the purpose of counting the electoral votes* for President and Vice-President of the United States, the President of the Senate will, in pursuance of the provisions of the Constitution, proceed to open the votes and deliver them to the tellers, in order that they may be counted."

The next occasion of particular interest, in its bearing upon the general question, is the canvass of 1857, when objection was made to the votes from the State of Wisconsin. It is impossible to say what disposition, if any, the Houses made of the objection, or whether the votes were finally counted. But the debate is instructive for the opinions of such men as Cass, Douglas, Crittenden, Humphrey Marshall, and others, in favor of the right of the Houses, and for the unqualified

disclaimer of the President of the Senate of any right to decide whether "any vote was a good or a bad vote."

We next come to the joint resolution of the two Houses, "declaring certain States not entitled to representation in the electoral college," passed shortly prior to the canvass of 1865. This resolution was sent to Mr. Lincoln for his approval. He signed it, as he says in his message of February 8, 1865, "in deference to the view of Congress implied in its passage and presentation to him;" but he adds: "In his own view, however, the two Houses of Congress, convened under the twelfth article of the Constitution, *have complete power to exclude from counting all electoral votes deemed by them to be illegal;* and it is not competent for the Executive to defeat or obstruct that power by a veto, as would be the case if his action were at all essential in the matter. He disclaims all right of the Executive to interfere in any way in the matter of canvassing or counting electoral votes."

About the same time was adopted the twenty-second joint rule of the Houses, by which, as is well known, the certificates, when opened and delivered to the tellers, were required to be read in the presence and hearing of the Houses; and, if, upon such reading, any question was raised in regard to counting the votes therein certified, the Houses should separately consider and decide it, and no vote objected to should be counted, except upon the concurrent, affirmative vote of both Houses.

It is not a material question whether this rule should still be regarded as operative or not, since it is clear that it could not enlarge or diminish the powers granted by the Constitution. But I am certainly authorized to assume that those who voted for its adoption did so upon the clear conviction that they were properly interpreting the constitutional grant; and that the nearly unanimous votes by which it was carried were not given with any view of diminishing a needful authority on the one hand or usurping power on the other. It is therefore a precedent of much weight; and, as an expression of the matured opinion of the men composing that Congress, it could scarcely be more emphatic.

The subject was again brought to public attention in the canvass of 1869. When the certificate from the State of

Louisiana was read, objection was made to counting the votes therein certified, and, upon the proposal that the Senate should withdraw in order that the objection might be considered by each of the Houses, and the joint rule being read, a member of the House raised a question of order, and, citing the constitutional provision, insisted that the rule was "in direct contravention of the terms of the Constitution." Benjamin F. Wade, of Ohio, was then President of the Senate, and near the close of the eighteenth year of his service in that body. In passing upon the question of order, he said: "The rule which has been read is one which was adopted by both Houses. The Chair declines to entertain the question of order, *but will say that he believes the rule to be in accordance with the Constitution.*"

The Houses then proceeded to consider the objection, and ordered the votes to be counted; but, upon consideration of a like objection to the votes from Georgia, they refused to count them, except in the hypothetical manner employed in the previous cases of Missouri and Michigan.

The objections to votes in the canvass of 1873 were still more numerous, and the power of the Houses more extensively applied than upon any previous occasion. Without descending to particulars, it may be enough to say that, as a result of all objections, three votes from the State of Georgia, and all the votes from the States of Arkansas and Louisiana, were rejected from the electoral count, either because one or both of the Houses refused to allow them to be counted. It is noticeable also that the leading objection made to the count of the Arkansas vote was "because the official returns of the election in said State, made according to the laws of said State, show that the persons certified to by the Secretary of said State as elected *were not elected* as electors for President and Vice-President of the United States at the election held November 5, 1872;" and that, while constant reference was made to the joint rule, no intimation was heard that it conflicted with the Constitution.

To these repeated instances of the proceedings had at joint meetings of the Houses, it is only necessary to add, as expressive of the continued opinion of the Senate, the passage of

Mr. Morton's bill by that body at its last session. So far as concerns any constitutional question, that bill accords to the Houses all the power and authority ever asserted by the joint rule or the previous practice of Congress; and I have the right to assume that it passed upon the reasons assigned by its author, when he said: "I do not accept the suggestion that the Vice-President of the United States has anything more to do in the business of counting the votes for President and Vice-President than that specific duty which is prescribed for and enjoined upon him by the Constitution. That duty is, in the presence of the Senate and House of Representatives, to open the certificates. There being no other duty assigned to him, I infer naturally that he is to do nothing more." And after considering at some length the necessity of a tribunal to decide upon conflicting returns, or any other question arising in the course of counting the votes, he says: "The duty is imposed upon the two Houses of Congress. *They alone can perform it.*" Pointed and positive as this language is, it is not more so than that of Mr. Clay, in 1821, when he declared: "The two Houses were called on to enumerate the votes for President and Vice-President; of course, they were called on *to decide what are votes.*"

It is thus made apparent, I think, to every comprehension that for a period of time much longer than the public life of any man living, every department and officer of the Government before whom such a question could arise, including both branches of Congress, the successive Presidents of the Senate, and the President of the United States, have (against opposing individual opinions, I grant) concurred in holding that the duty of canvassing and counting the electoral votes was devolved by the Constitution upon the two Houses of Congress. The vast significance of this fact will be readily appreciated by every statesman and lawyer deserving the name, and indeed by every intelligent man having a care for the stability of our institutions.

So long as language remains the imperfect vehicle of thought that it is, and so many questions are left to arise upon its true meaning and proper application, constitutions and statutes alike must submit to the ordeal of interpretation

in the proper tribunals. But when questions of this nature have over and over again been decided in the same way, covering a long period of time, such decisions do not alone furnish evidence of the correctness of the construction adopted, but the law founds upon them one of its cherished maxims; and from that time *stare decisis* becomes the rule alike of safety and repose. And this, upon the most rational principles. The Constitution of the United States is the work of the people of the States, who, in the mode provided, can alter or change it at their pleasure. If they acquiesce for a long time in a construction of one of its provisions, the presumption arises that it is interpreted according to their wishes, and the construction becomes in effect a part of the text itself. I am aware that none of these precedents were made when they could operate to change the result of an election; but in that consists their chief value, since it cannot be supposed that either personal or party considerations influenced, or at the most controlled, the judgment of the Houses.

I am also aware that many persons think this an unsafe deposit of so delicate a power, and that it will be used to further the designs and accomplish the ends of political parties. No doubt all power may be abused and perverted; but no one has yet pointed out a safer depository of this authority; and if, unfortunately, the time shall ever come when neither the honor, oath, nor frequent accountability of the representatives of the people and the States can be relied upon to secure justice, impartiality, and fair dealing, between all the members of the Union, it may well be doubted whether we have not arrived at the point where constitutional arrangements will cease to furnish any effectual remedy for the ills that may afflict us.

And here I might well stop, my only object being to demonstrate that the duty of sifting, canvassing, and counting the electoral votes, is cast upon the two Houses of Congress. It follows that it is a duty which cannot be declined by them, and that every member owes it to himself, to his State or district, and to the country at large, to meet the responsibility in that spirit of justice and truth which never fails to command the approval of the matured judgment and

sober reflection of the people. And it further follows, unless I greatly mistake the temper of the country, that any failure properly to perform this duty, or any declaration of a false result, would encounter the instant reprobation of all right-thinking men.

I have not intended to enter upon an examination of the proper course of proceeding, or the principles which should govern the two Houses in the discharge of this duty, knowing that the whole matter is in much abler hands. But I cannot forbear to say that it sounds very strangely in the ears of a lawyer, accustomed to read from Coke down, that fraud vitiates all transactions into which it enters, even the most solemn judicial proceedings; to be told that the votes of men who were never elected in a State, but have fraudulently procured the requisite certificate, must nevertheless be received and counted. The short and conclusive answer to such a proposition is, that the men were never *chosen* for electors, and that, as *illegal* votes cannot be counted, nothing can be more distinctly illegal than falsehood and fraud.

I should certainly be astonished to find that while the Government of the Union was strong enough to compel the authorities of the States to comply with all the required formalities on pain of having their votes rejected, it quailed before falsehood and fraud, and was compelled to allow mere intruders to usurp the privileges and wield the powers of a sovereign State in the Union; that while formalities must be observed, no adequate remedy had been provided for expelling the fatal poison upon which the life of the republic might depend. Very truly yours,

R. P. Ranney.